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Cases Cited.

Notice of Motion.

United States Circuit Court of Appeals,

For the Second Circuit.

In the Matter

of

Morton Atwater, Eliot Atwater, Gilbert F. Foote and Harold W. Sherrill, individually and as co-partners, doing business as Atwater, Foote & Sherrill,

Bankrupts,

Edward S. Atwater,

Petitioner.

To Stephen G. Guernsey, Samuel H. Brown and Charles A. Hopkins, trustees in bankruptcy of the above named bankrupts and their solicitor.

You Will Please Take Notice that the petitioner, Edward S. Atwater, in the above-entitled cause, on Monday the 4th day of October, 1920, at the opening of court on that day or as

soon thereafter as counsel can be heard will submit to the Supreme Court of the United States in its Court Room at the Capitol in the City of Washington, D. C., the within motion for a writ of certiorari from said Supreme Court to the United States Circuit Court of Appeals for the Second Circuit; and that such motion will be made upon the petition and brief hereto annexed, and a copy of the record in this cause.

Dated, August 12th, 1920.

FRANK B. LOWN,
Solicitor for Petitioner,
Poughkeepsie, N. Y.

Motion.

SUPREME COURT OF THE UNITED STATES.

IN THE MATTER of MORTON ATWATER, ELIOT ATWATER, GILBERT F. FOOTE and HAROLD W. SHERRILL, individually and as co-partners, doing business as ATWATER, FOOTE & SHERRILL, Bankrupts, EDWARD S. ATWATER, Petitioner.	Motion for writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Comes now Edward S. Atwater by Frank B. Lown and Abram J. Rose, his counsel, and moves this Honorable Court that it shall by certiorari or other proper process directed to the Honorable the Judges of the United States Circuit Court of Appeals for the Second Circuit, require said court to certify to this court for its review and determination a certain cause in said Court of Appeals lately pending wherein the petitioner, Edward S. Atwater was appellant and

Motion.

Stephen G. Guernsey, Samuel H. Brown and Charles A. Hopkins, trustees in bankruptcy of the above named bankrupts were appellees; and to that end he now tenders herewith his petition and brief with a certified copy of the entire record in said cause in said Circuit Court of Appeals.

FRANK B. LOWN,
ABRAM J. ROSE,
Counsel for Petitioner.

Petition.

SUPREME COURT OF THE UNITED STATES.

In the Matter of Morton Atwater, Elliot Atwater, Gilbert F. Foote and Harold W. Sherrill, individually and as co-partners, doing business as Atwater, Foote & Sherrill, Bankrupts, Edward S. Atwater, Petitioner.	Petition for writ of certiorari to the United States Circuit Court of Appeals, Second Circuit.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States

Your petitioner, Edward S. Atwater, respectfully shows:

The question of law sought to be reviewed by this Court, decided adversely by the Court below by a divided vote, is whether parol evidence was admissible to show the purpose for and the con-

dition on which a general release under seal, executed by the petitioner Edward S. Atwater to his son Eliot Atwater, of an advance to his son of the purchase price of a seat in the New York Stock Exchange in compliance with the rules and regulations of said Exchange, was given; which purpose and condition by the mutual agreement and understanding of the party was to protect creditor members of the Exchange only, and was not intended to be effective in favor of general creditors of the debtor. Such parol evidence, it is claimed, was permissible under well established rules laid down by this Court and other Federal Courts, as well as by the State Courts, and that the ruling below is in direct conflict with the decision by the New York Court of Appeals in *Sterling* v. *Chapin*, 185 N. Y., 395.

The decree of the Circuit Court of Appeals sought to be reviewed herein was entered on the 1st day of June, 1920, and affirmed by a divided vote an order and decree of the United States District Court, Southern District of New York, expunging the claim of Edward S. Atwater against the individual estate of Eliot Atwater, one of the members of the firm of Atwater, Foote & Sherrill, the above named bankrupts, for the sum of Seventy-five Thousand Dollars ($75,000) monies advanced by the petitioner and used in the purchase of a seat for said Eliot Atwater in the New York Stock Exchange.

The trustees in bankruptcy of said firm objected to the allowance of the claim and moved

to expunge it, whereupon the matter was referred to a Special Master who made his report on the facts and held as a conclusion of law that the petitioner was estopped from asserting his claim by reason of the execution of certain releases given by him to said Eliot Atwater at the time of the advancement of the sum claimed and the purchase of the seat referred to, and recommended that the petition of the trustees to reject and expunge such claim should be granted.

The report of the Special Master was confirmed by the District Court and an order was entered expunging and disallowing said claim.

From such order an appeal was taken by the petitioner to the Circuit Court of Appeals for the Second Circuit, which court as said, affirmed, by a divided vote, the decree appealed from.

The facts are as follows:

The firm of Atwater, Foote & Sherrill were stockbrokers engaged in business at Poughkeepsie, New York.

Against this firm a petition in bankruptcy was filed and it was duly adjudicated a bankrupt. Eliot Atwater, a son of the petitioner, was one of the members of the bankrupt firm.

On May 16, 1912, prior to the organization of the firm, a seat on the New York Stock Exchange was purchased by Eliot Atwater with money advanced to him for that purpose by his father, Edward S. Atwater, the petitioner. The price paid for the seat was Seventy-three Thousand Dollars ($73,000) and the initiation fee was Two Thousand and Ten Dollars ($2,010) making Seventy-five Thousand Dollars ($75,000) which is the subject of the claim presented by the petitioner to the trustees and which has been disallowed and expunged by order of the court below. The Constitution of the New York Stock Exchange in reference to the transfer of membership therein provides as follows:

> "Sec. 3. Upon any transfer of membership whether made by a member voluntarily or by the Governing Committee or the Committee on Admission in pursuance of the provisions of this Constitution, the proceeds thereof shall be applied to the following purposes and in the following order of priority, viz:
>
> FIRST: The payent of all fines, dues, assessments and charges of the Exchange or any department thereof against members whose membership is transferred.
>
> SECOND: The payment of creditors' members of the Exchange, or firms registered

thereon of all filed claims arising from contracts subject to the rules of the Exchange, if and to the extent that the same shall be allowed by the Committee on Admission. If said proceeds shall be insufficient to pay such claims as so allowed in full, the same shall be applied to the payment thereof pro rata.

THIRD: The surplus, if any, of said proceeds shall be paid to the person whose membership is transferred or to his legal representatives upon the execution by him or them of a release or releases satisfactory to the Committee on Admission." (Record, p. 83, fols. 247-249.)

Under this provision of the Constitution, the rules of the Exchange require that before an applicant may purchase a seat thereon, he must file a general release from his debts and obligations. For the purpose of complying with these provisions and rules, on May 1, 1912, Edward S. Atwater, the petitioner, at the time of the purchase of the seat for his son, executed and delivered to him a sealed general release

"of all claims and demands whatsoever in law or in equity which against the said Eliot Atwater I ever had, now have or which I or my heirs, executors or administrators hereafter can, shall or may have * * * and

more particularly by reason of an advance of the sum of $73,000 made to said Eliot Atwater to enable him, the said Eliot Atwater, to purchase a membership in the New York Stock Exchange."

A similar release was executed and delivered by the appellant to his son referring to the sum of $2,010 paid as initiation fee to the Exchange. Both of these releases were for the nominal consideration of $1.00 (Record, p. 70, fol. 208; p. 72, fol. 214).

Before the execution and delivery of these releases, the petitioner was told by his son that they were only for the purpose of complying with the requirements of the Exchange and in order to protect such creditors as might be members of the Exchange against any prior lien on the seat in case of the financial failure of the owner.

On this subject the testimony of the petitioner was as follows:

"He (Eliot) handed me the paper and said it was necessary for me to sign it in accordance with the rules of the Stock Exchange because the rules said about claims of members upon each other * * * it was necessary to waive my rights in accordance with that. * * * He told me that it was necessary for me to sign that paper in

accordance with the rules of the Stock Exchange, that it didn't amount to anything except to give the members of the Stock Exchange and the claims they might have against each other precedence over myself. I said I didn't think that amounted to anything and I signed it though I didn't write to the Stock Exchange for any rules." (Record, pp. 30-31, fols. 89-91.)

In this testimony the petitioner is corroborated by his son, Eliot, who testified that after borrowing the $75,000 from his father he brought him the releases and told him that it was necessary for him to sign them "in order to protect such creditors as might be members of the Stock Exchange." (Record, p. 29, fol. 86.)

On June 1, 1912, after the purchase of the seat and after the giving of the releases mentioned, the firm of Atwater, Foote & Sherrill, the bankrupts, was formed under articles of co-partnership which expired by limitation on June 1, 1915. On June 1, 1916, new articles of co-partnership were executed providing for a partnership on a yearly basis from June to June of each year and thereafter indefinitely, terminable however by any partner on 60 days' notice prior to June 1 of any year. At the time of the adjudication in bankruptcy, the firm existed under the terms of the second agreement dated June 1, 1916. The articles of co-partnership in force

at the time of the adjudication in bankruptcy provided among other things as follows:

"SECOND: It is understood and agreed that Morton Atwater furnishes to the partnership the loan of Fifty Thousand Dollars ($50,000) working capital; Gilbert F. Foote and Harold W. Sherrill the good-will and the business, of the agreed value of Ten Thousand Dollars ($10,000) which they have established and built up under the firm name of Foote & Sherrill; Eliot Atwater the use of his membership on the New York Stock Exchange * * *.

THIRD: Every six months there shall be paid to Eliot Atwater such an amount as shall pay interest for six months at the rate of six per cent (6%) per annum on Seventy-five Thousand Dollars ($75,000) being the purchase price and initiation fee of his membership on the New York Stock Exchange * * *.

FOURTH: All the earnings of Eliot Atwater as a member of the New Stock Exchange shall accrue to the firm. * * *

TENTH: In the event that Eliot Atwater should wish upon the dissolution of the partnership to sell or transfer his membership on the New York Stock Exchange he

agrees to give to Morton Atwater, Gilbert F. Foote and Harold W. Sherrill the option to purchase said membership at the price then current but said option shall expire on 60 days after the dissolution of the partnership." (Record, pp. 74-77, fols. 222-239.)

It is conceded that there are no creditors of the firm of Atwater, Foote & Sherrill, members of the New York Stock Exchange, and no claim has been filed with the trustees by any creditors who are members of such Exchange.

In the court below two questions were presented for decision:

(1) Was the Stock Exchange seat owned by the firm or was it the individual property of E. t At ater?

(2) Is the appellant (the petitioner) estopped from asserting his claim as against the firm or individual members?

The learned court below was unanimously of the opinion that the seat was the individual property of Eliot Atwater, but was divided in its opinion as to the effect of the releases given.

Circuit Judge Ward in an opinion dissenting from that of Circuit Judges Manton and Hough

pointed out that while a release under seal could not be contradicted by one party as against the other or as against a third party who has been prejudiced by relying on it, in the absence of such prejudice both parties to a release may agree that as between themselves it was to be limited to a particular purpose and there being no evidence whatever in the case that any creditor of the bankrupt firm or of Eliot Atwater individually relied upon or even knew of the existence of the releases, there could be no estoppel in favor of the trustees in bankruptcy representing the creditors in general. The following quotation is taken from JUDGE WARD'S dissenting opinion:

> "In this case, for instance, if there had been no bankruptcy, Eliot Atwater and his father, Edward S. Atwater, could have agreed that the release though general was made for the benefit of the Stock Exchange creditors only and that the transaction was as between themselves a loan by the father of the price of the seat to the son. If that was the fact, no other creditors of Eliot Atwater could prevent his father from recovering and collecting a judgment from him for the amount of the loan. So if Eliot Atwater had died, any admission by him to this effect could have been availed of by his father. *Sterling* v. *Chapin,* 185 N. Y., 395. On the other hand, any creditor of Eliot

who had relied upon the release and who would be prejudiced by its being contradicted might insist upon its literal enforcement as to him. This on the ground of estoppel.

But there is no evidence whatever in this case that any creditor of the firm or of Eliot Atwater individually did so rely or even know of the existence of the release and I think there can be no estoppel in favor of the trustee in bankruptcy representing the creditors in general."

The majority of the court however, consisting of JUDGES HOUGH and MANTON, placed their decision wholly on the ground that parol evidence was inadmissible to show the *purpose* for and the *condition* on which the releases were executed and that their effect must be determined solely by their express terms. We quote the following from the majority opinion:

"The scope and extent of a release depend as a rule upon the interest (intent) of the parties as expressed in the terms of the particular instrument. Parol evidence is inadmissible to prove that claims not included in the writing were understood at the time of the executing of the release to be embraced in the transaction. Parol evidence cannot be offered to vary the docu-

ment (*St. Louis & S. F. Ry. Co.* v. *Dearborn Co.*, 60 Fed., 880; *Holbrook* v. *Sperling*, 239 Fed. Rep., 715). Parol evidence is admissible where, while not changing the nature of the contract, it shows the reason for the execution of the release and points out its use and application. But a valid release as conclusively estops the parties from reviving and litigating the claim released as a final act and it forever extinguishes a personal right of action. It completely discharges and extinguishes all rights and claims of the releasor against the releasee which are included in the release and this is true even though the releasee fails fully to perform a promise which was the consideration for the release unless the operation of the release was based upon full performance. Even if invalid, it is binding upon the parties until attacked in a proper manner and set aside. * * * A release like every other contractual obligation has for its primary rule of construction the intention of the parties. This must govern. This intention, however, must be clear from the words used in the instrument and not from matters *de hors* the writing (*Hoes* v. *Van Hoesen*, 1 Barb. Chan. N. Y., 379 *Sherburne* v. *Goodwin*, 44 N. H., 271). The release here does not contain any limitation which would indicate an intent at the time of its

> execution of a conditional delivery so as to satisfy the requirements to purchase a membership upon the Exchange. We cannot read into the language of the release such limitation and thus defeat the claims of other creditors."

Thus while expressly admitting that parol evidence is admissible to show the *purpose* and *condition* of the delivery of an instrument, and that every contractual obligation has for its primary rule of construction the intention of the parties, the majority opinion holds that such rule is not applicable to a release, and that in order to limit its effect to the *purpose* for and the *condition* on which it was given such limitation must appear by the terms of the instrument itself and may not be established from matters *de hors* the writing.

The majority opinion, it is submitted, is in direct conflict with the rule laid down in many authorities by this Court and of universal application that, in the absence of estoppel, parol evidence *de hors* the writing is admissible for the purpose of showing the *purpose* of the execution of the writing and the effect which by the agreement of the parties is to be given thereto.

The majority opinion is also in direct conflict with the decision by the Court of Appeals of the State of New York in *Sterling* vs. *Chapin*, 185 N. Y., 395, expressly holding that a release executed for the limited purpose of complying

with the rules of the New York Stock Exchange and not with the intention of cancelling the indebtedness, would not bar recovery for the amount advanced for the purchase price of the seat by the releasor.

By the decision in the present proceeding, therefore, a direct conflict is created and will exist between the decision by the highest court of the State of New York and the decision by the Circuit Court of Appeals for the Second Circuit sitting in that State, as to the effect to be given to a release executed for the purpose only of complying with the rules of the New York Stock Exchange and with no intention as between the parties themselves of releasing the indebtedness except as to creditor members of the Exchange; and in any proceeding brought in the State Court a release given for such a purpose will be held to have an entirely different effect from that of the same or other release of like nature in a proceeding brought in the Federal Courts sitting in that State.

The membership of the New York Stock Exchange is 1100 members, four-fifths of whom execute releases under the requirements of the rules of the Exchange at the time of the purchase of their seats of similar character and import to those in the present proceedings, and questions as to the rights of creditors, not members of the Exchange, are constantly arising by reason of members of the Exchange becoming insolvent, and numberless proceedings will in the

future, as in the past be brought both in the State Courts and the Federal Courts, in insolvency and bankruptcy proceedings to establish the claims of creditors not members of the Exchange in the assets of an insolvent member. This application, therefore, is not predicated only upon the rights of the individual petitioner but is based upon the obvious necessity of resolving the conflict between the decision of the highest court of the State of New York and the decision in this proceeding as to the rights of non-member creditors in the assets of an insolvent member of the New York Stock Exchange where a release has been given under the circumstances shown in the present proceeding, and to the end that such conflict be settled, it is necessary that the decision below should be corrected by this Court.

WHEREFORE your petitioner prays that this Honorable Court will be pleased to grant a writ of certiorari directed to the United States Circuit of Appeals for the Second Circuit requiring that court to certify a full and complete transcript of record in the above entitled cause to this Honorable Court for its review and determination.

FRANK B. LOWN,
Solicitor for Petitioner.

VERIFICATION:

State of New York, } ss.:
County of Dutchess, }

FRANK B. LOWN, being duly sworn, says: That he is the solicitor for the petitioner, Edward S. Atwater, herein, and that the allegations of said petition are true as he is informed and verily believes.

FRANK B. LOWN.

Sworn to before me this
10th day of August, 1920.
JOHN B. GRUBB,
Notary Public.

CERTIFICATE OF COUNSEL.

We hereby certify that we are counsel for the petitioner herein, Edward S. Atwater; that the allegations of fact contained in said petition are true and that said petition in our opinion is well founded in law as well as fact.

ABRAM J. ROSE,
FRANK B. LOWN,
Counsel for Petitioner.

BRIEF OF ARGUMENT.

The decision of the United States Circuit Court of Appeals for the Second Circuit should be reviewed by this Court because,

FIRST: The majority decision, in violation of the Bankruptcy Act, 1898, Sec. 5, Clause F, denies to the petitioner, as an individual creditor of Eliot Atwater, a member of the bankrupt firm, priority in payment of his debt out of the individual assets of Eliot Atwater over claims of partnership creditors.

SECOND: The majority decision is in conflict with the rule of evidence announced by this Court and other Federal and State Courts, that in the case of any instrument, in the absence of an estoppel, it is always competent to show that it was not delivered, or that the delivery was upon certain conditions, or for a particular purpose.

THIRD: The majority decision creates a direct conflict with the decision by the highest Court of the State of New York in *Sterling* v. *Chapin*, 185 N. Y., 395, as to the effect of a general release given simply for the purpose of complying with the requirements of the rules and regulations of the New York Stock Exchange, and without an intention as between the parties to

the instrument of discharging the indebtedness, except as to creditor members of the Exchange.

FOURTH: The majority decision is also in conflict with the rule of evidence that in a suit between a party and a stranger, neither is concluded by the writing, but either may give evidence differing from it.

FIFTH: The majority decision also involves a misconstruction of the rule of evidence that where the agreement as reduced to writing omits or contains terms or stipulations contrary to the common intention of the parties the instrument will be corrected so as to make it conform to their real intent.

SIXTH: The majority decision will in its effect create great confusion and inequality in the State of New York among creditors of insolvent Stock Exchange members, which dangerous and inequitable situation calls for a decision by this Court harmonizing the rule in the Federal courts sitting in the State of New York with that in the State courts.

BRIEF.

I.

The petitioner as an individual creditor of Eliot Atwater is (if his claim is not barred by the releases in question) entitled to priority in payment of his debt out of the individual assets of Eliot Atwater over claims of partnership creditors of Atwater, Foote & Sherrill.

Bankruptcy Act 1898, Section 5, Clause F;
Farmers & Mechanics National Bank v. *Ridge Avenue Bank*, 240 U. S., 498;
In re: *Wilcox*, 94 Fed. Rep., 84.

Unless therefore the petitioner's claim is barred by the releases given by him to his son, it should have been allowed to be proved and the court below erred in rejecting and expunging it.

II.

The majority opinion wholly ignores and overlooks the fact that by the express agreement and understanding between the petitioner and his son to whom he advanced the money for the purchase of the seat, the releases were executed wholly and solely for the purpose of complying with the rules and regulations of the Exchange

and for no other purpose, and that *as between themselves the indebtedness would still exist* (Record, pp. 30-31, fols. 89-91; p. 29, fol. 86).

That this was the understanding of the parties is wholly undisputed. The proof, therefore, is that the release was given for a limited purpose only and on the condition that they should not discharge the debt, except as to creditor members of the Exchange.

Under such circumstances the release should have been limited to that purpose and given no greater effect.

In the case of any instrument in the absence of an estoppel, it is always competent to show that it was not delivered, or that the delivery was upon certain conditions or for a particular purpose.

Peugh v. *Davis*, 96 U. S., 332;
Brick v. *Brick*, 98 U. S., 514;
Jackson v. *Lawrence*, 117 U. S., 679;
Cabrera v. *American Colonial Bank*, 214 U. S., 224;
Valdes v. *Central Altagracia*, 225 U. S., 58;
Ducie v. *Ford*, 138 U. S., 587;
Western Underwriting & Mortgage Co. v. *Valley Bank of Phoenix*, 237 Fed. Rep., 45;
Lumley v. *Wabash Railroad Co.*, 76 Fed. Rep., 66.

To the same effect are the decisions by the highest court in the State of New York:

Herrick v. *Carman*, 10 Johnson, 224;
Grierson v. *Mason*, 60 N. Y., 394;
Matthews v. *Sheehan*, 69 N. Y., 585;
Juilliard v. *Chaffee*, 92 N. Y. 529;
Marsh v. *McNair*, 99 N. Y., 174;
Schmittler v. *Simon*, 114 N. Y., 176;
Ensign v. *Ensign*, 120 N. Y., 655;
Thomas v. *Scutt*, 127 N. Y., 133;
Blewitt v. *Boorum*, 142 N. Y., 357;
Baird v. *Baird*, 145 N. Y., 659;
Higgins v. *Ridgway*, 153 N. Y., 130;
Sterling v. *Chapin*, 185 N. Y., 398.
Grannis v. *Stevens*, 216 N. Y., 583.

In *Peugh* v. *Davis*, *supra*, this court had before it a deed absolute in form but claimed to have been executed as security for a loan of money. It was held that evidence *de hors* the writing was admissible to show the real purpose of the transaction.

In *Brick* v. *Brick*, *supra*, the rule in *Peugh* v. *Davis* was followed with respect to a pledge of a certificate of stock as security for a loan of money.

In *Cabrera* v. *American Colonial Bank*, *supra*, in which it was claimed that a bill of sale was an absolute conveyance and accomplished the payment of debts to a bank, this court said:

"The face of an instrument is not always

> conclusive of its purpose. In equity extrinsic evidence is admitted to show that a conveyance absolute on its face was intended as security. The rule regards the circumstances of the parties and executes their real intention and prevents either of the parties to the instrument committing a fraud on the other by claiming it as an absolute conveyance notwithstanding it was given and accepted as security. In other words, the real transaction is permitted to be proved."

In *Grierson* v. *Mason, supra,* the plaintiff tried to prove that his commissions were to amount to at least $1500 a year. The defendant offered in evidence an agreement between the parties limiting these commissions to five per cent. The plaintiff was permitted to prove that the *purpose* for which this agreement was executed was not to limit the amount but to induce one Woods to advance money upon the goods. The Court of Appeals of New York said:

> "Such evidence does not come within the ordinary rule of introducing parol evidence to contradict written testimony but tends to explain the circumstances under which such an instrument was executed and delivered or to show that it was cancelled or surrendered."

Such a rule obviously is necessary to prevent fraud.

The majority opinion in the court below, it is submitted, is in direct conflict with the salutary rule laid down in the cases referred to and the true rule is stated in the minority opinion to the effect that the petitioner and his son "could have agreed that the release though general was made for the benefit of the Stock Exchange creditors only and that the transaction was as between themselves a loan by the father of the price of the seat to the son" and that in the absence of evidence showing "that any creditor of the bankrupt firm or of Ekot Atwater individually did so rely or even know of the existence of the release * * * there can be no estoppel in favor of the trustee in bankruptcy representing the creditors in general." (Opinion, WARD, CIRCUIT JUDGE, Record, p. 126, fol. 378.)

III.

The majority opinion also is in direct conflict with the decision by the highest court of the State of New York in *Sterling* v. *Chapin*, 185 N. Y. 395.

In *Sterling* v. *Chapin*, the testator advanced money to his brother, the defendant (they being partners in a stock brokerage business) for the purchase of a seat in the New York Stock Exchange. The testator executed a release in which he released his brother, the defendant, from all claims and demands which he had by reason of the advance, which release was

delivered to the authorities of the Stock Ex
change at the time of the purchase of the sea
by the defendant. The evidence showed tha
notwithstanding the giving of the release th
parties always considered as between themselve
that the indebtedness existed.

Holding that the release was not a bar to
recovery by the executor of the testator of th
monies advanced, it was said by the learne
Judge writing for the NEW YORK COURT OF A
PEALS:

> "I have already referred to the rule
> the Stock Exchange which required an a
> surance that a proposed member was fr
> from indebtedness as a protection to t
> members against any claim which any pe
> son might have for monies advanced for t
> purchase of his seat. The defendant w
> about to become such member. The testat
> whether he did it as an individual or
> means of the co-partnership capital whi
> he had solely furnished, advanced the mo
> ey for the purchase of the seat. He ex
> cuted the instrument in question which
> between him and the Stock Exchange wou
> have operated to prevent any claim for th
> advance in which ever form made. * * *
> do not think we are thus compelled
> (*i. e.*, to permit the discharge of the exi
> ing debt simply by virtue of the releas
> but that in the manner indicated such eff
> may be given to both the release and t

entries upon the books as will accomplish the true intent and understanding of the parties."

The majority opinion sought to distinguish the case cited from the present case on the ground that in the former no rights of creditors arose and that the release was delivered to the Stock Exchange and not to the borrower of the money. It is submitted the decision cited is not distinguishable on these grounds. In the present case it was not shown, and this fact is expressly stated in the minority opinion of the CIRCUIT JUDGE WARD, that any creditor of the firm or of Eliot Atwater individually relied on the release or even knew of its existence and for that reason there could be no estoppel in favor of the trustees in bankruptcy representing the creditors in general. (Opinion, WARD, CIRCUIT JUDGE, Record, p. 126, fol. 378). The creditors therefore could have no greater rights than the debtor himself, and if as to him the release was not effective (except as to creditors members of the Exchange) to discharge his indebtedness to his father, it could not be availed of by the general creditors. Nor, it is submitted, does it make any difference whatsoever that the release was delivered to Eliot Atwater and by him delivered to the Stock Exchange instead of a direct delivery to the Exchange as was made in the case cited. The *purpose* for and the condition on which the releases were given determine their effect and not the mere manual agency through which the delivery was made.

IV.

The Trustees representing the general creditors are third parties to the releases, in the sense in which the term is used in the rule that in a suit between a party and a stranger neither is concluded by the writing but either may give evidence differing from it.

Valdes v. *Central Altagracia*, 225 U. S., 58, at page 75;
O'Shea v. *New York C. & St. L. Ry. Co.*, 105 Fed. Rep., 559.

V.

Both parties to the releases, according to the undisputed proof, intended and understood that they were limited in their purpose and effect to creditor members of the Exchange, and that the indebtedness still existed as to all other persons, and if the releases as drawn extinguished and cancelled the indebtedness as to general creditors, they were entered into by mutual mistake, which fact extrinsic evidence was permissible to prove because the writing did not express the actual agreement of the parties.

Hearne v. *N. E. Mutual Marine Ins. Co.*, 87 U. S., 488;
Equitable Safety Ins. Co. v. *Hearne*, 87 U. S., 494;

Snell v. *Atlantic F. & M. Ins. Co.*, 98 U. S., 85;
Griswold v. *Hazard*, 141 U. S., 260;
Walden v. *Skinner*, 101 U. S., 577;
Thompson v. *Phenix Ins. Co.*, 136 U. S., 287.

VI.

The effect of the majority decision will be to create great confusion and inequality in the State of New York among creditors of insolvent Stock Exchange Members.

The membership of the Exchange is 1100 members, four-fifths of whom have executed releases of similar import to the one in suit.

In proceedings brought in the State courts of New York against an insolvent member, under the decision by the Court of Appeals in *Sterling* v. *Chapin* (*supra*) the effect of these releases though general in form may be limited to and availed of only by creditors, members of the Exchange, while in a proceeding in the Federal courts sitting in that State, under the decision by the Court below they may be availed of by general creditors not members of the Exchange to bar the proof of a debt never intended by the parties to the releases to have been included in it.

Moreover, while under the State court decision an individual creditor, in accordance with the provisions of the Bankruptcy Act, Section

5, Clause F, may prove his debt and secure priority in payment thereof out of the individual assets of a member of an insolvent firm over claims of partnership creditors, under the decision by the Court below, an individual creditor will be barred from proving his debt, and thereby the provisions of the Bankruptcy Act will be defeated.

Thus, under the decision by the Court below firm creditors, non-members of the New York Stock Exchange, will have greater rights, and indivdual creditors will have less rights in the assets of an insolvent Stock Exchange firm and the members thereof, than non-member creditors pursuing their remedies in the State courts.

This dangerous and altogether inequitable situation, it is submitted, calls for a decision by this Court harmonizing the rule in the bankruptcy and other Federal courts with that in the State courts of New York, and to that end the review of the decision below by this Court for the purpose of correcting the error in such decision is necessary and indispensable.

VII.

The petition should be granted and a writ of certiorari issued as prayed.

Abram J. Rose,
Frank B. Lown,
Counsel for Petitioner.

CASES CITED.

United States Supreme Court

In the Matter *of* Morton Atwater, Eliot Atwater, Gilbert F. Foote, and Harold W. Sherrill, individually and as co-partners doing business as Atwater, Foote & Sherrill, Bankrupts, Edward S. Atwater, Petitioner.	Respondents' Brief

Stephen G. Guernsey, Samuel H. Brown and Charles A. Hopkins, as trustees in bankruptcy for all the above named bankrupts respectfully make and file this brief as the respondents herein.

FACTS

The petitioner Edward S. Atwater filed a claim against the individual estate of Eliot Atwater for $75,000, money advanced by him to his son, the said Eliot Atwater, to be used in the purchase of a seat in the New York Stock Exchange. The trustees in bankruptcy objected to the allowance of the claim and moved to expunge the same. The matter was referred to a Special Master, who made a report establishing the facts and holding as a conclusion of law that the petitioner was by reason of the execution of certain releases, barred and estopped from asserting his claim and that the petition

of the trustees to reject and expunge such claims should be granted. An order was made by Mayer, Judge of the United States District Court, for the Southern District of New York, confirming the Special Master's report and ordering that the proof of claim, filed by the petitioner against the individual estate of Eliot Atwater, be expunged and dis-allowed. An appeal was taken from the order of said United States District Court to the United States Circuit Court of Appeals for the Second Circuit and the decision was rendered by that Court sustaining the order of the United States District Court.

The individuals composing the bankrupt firm entered into an agreement on June 1, 1912, whereby they formed a partnership under the firm name and style of Atwater, Foote & Sherrill. See Claimant's Exhibit 1, Page 74 of Record.

Under this agreement Eliot Atwater was to put in the use of his membership on the New York Stock Exchange and every six months there was to be paid to him "such an amount as shall pay interest for six months at the rate of six per cent. per annum on $75,000," being the purchase price and initiation fee of his membership on the New York Stock Exchange. Apparently contemporaneously with the signing of the co-partnership agreement, to wit, May 1, 1912, at any rate, on that day, Edward S. Atwater, the petitioner, executed and delivered to Eliot Atwater two releases—trustees' exhibits A and B, (Page 70 and 72 of Record).

The questions therefore presented to the Special Master were:

A. Did the purchase of the Stock Exchange Seat at the time of its purchase or at any time afterward become the asset and property of the firm?

B. Or whether it upon such purchase and ever afterward remained the individual property of Eliot Atwater.

C. If it remained the property of Eliot Atwater is the petitioner entitled to enforce his claim against his son's assets or is he barred by reason of the execution of the releases before referred to?

The Special Master held that the seat was the individual property of Eliot Atwater:

First: That Eliot Atwater became the individual owner of the seat in the New York Stock Exchange on May 16, 1912, and was such individual owner at the time of the filing of the petition in bankruptcy. Record, Page 87.

Second: The said seat was never the property of the firm of Atwater, Foote & Sherrill.

Third: That by the execution and delivery to said Eliot Atwater by Edward S. Atwater, the petitioner, of the releases, trustees' exhibits A and B as shown in the record, the said Edward S. Atwater was barred and estopped from asserting a claim to the profits of said seat or as an individual creditor of said Eliot Atwater for the moneys advanced toward the purchase price thereof and for initiation fees in said exchange has received precedence

in bankruptcy action of the general creditors of the firm of Atwater, Foote & Sherrill.

The U. S. District Court on the 14th day of January, 1920, confirmed the Special Master's report and expunged and disallowed the claim of said Edward S. Atwater against his son, Eliot Atwater, Page 102 of Record, and on the first day of June, 1920, a decree was made by the Circuit Court of Appeals for the Second Circuit affirming a decree in the United States District Court and the petitioner herein now seeks to have the decision of the Circuit Court reviewed and the sole question to be considered by this court is whether parole evidence was competent to vary or explain the terms of the original release as against the trustees and whether the releases as evidence are not a bar to petitioner's right to establish his claim against said Eliot Atwater. There are no creditors of the firm of Atwater, Foote & Sherrill members of the New York Stock Exchange and no claim has been filed with the trustees by any creditors who are members of such Exchange.

POINT I.

STOCK EXCHANGE SEAT BELONGS TO ELIOT ATWATER.

All the facts connected with the purchase of the seat, obtaining of moneys to be paid for the same, the purpose and object of the purchase, the dealings of the firm with relation to the seat are conceded, and offer no ground for dispute. The parties themselves interpreted the release between

themselves when contributing to the assets of the firm at its creation Eliot Atwater's contribution being "the use of his membership in the New York Stock Exchange" and they further provided that each six months there should be paid to him "interest at the rate of six per cent. on $75,000" being the purchase and initiation fee of his membership in the New York Stock Exchange. The testimony shows that such interest was paid by the firm, therefore, to Eliot Atwater or his father upon the said $75,000. No change was made by the articles of co-partnership affecting or relating to the $75,000 except the firm was to pay interest only on the average selling price of a seat during the preceding six months. The testimony shows that after the new arrangement the amount paid by the firm did not equal six per cent. upon $75,000 to Eliot Atwater. Record, Page 57.

It is difficult to understand how on the foregoing conceded facts any controversy can have arisen as to the ownership of the seat in question. The fact of the ownership by the said Eliot Atwater of the seat in the Stock Exchange is established by the Special Master's report, order of confirmation and decision of the Circuit Court of Appeals.

POINT II.

THE PETITIONER IS ESTOPPED FROM ASSERTING HIS ALLEGED CLAIM AS AGAINST THE FIRM OR INDIVIDUAL CREDITORS.

Estoppel by releases under seal.

An examination of the releases which are under seal and appear in Pages 70, 71, and 72 of the Rec-

ord shows that they not only released Eliot Atwater from all claims and demands, but especially by reason of the advance of $75,000 by the father, the petitioner, to enable him to buy a seat and to pay his initiation fee in the Stock Exchange. These releases are still in force and have never been surrendered or cancelled. They were delivered by the father to his son, Eliot Atwater, who in turn delivered them to the New York Stock Exchange. Record, Page 4.

After their delivery to the son, by him to Stock Exchange, there was no liability of any kind on the part of Eliot Atwater to repay such sum to his father, Edward S. Atwater, the petitioner. There does not appear in the Record any evidence of any revival of the debt after the delivery of the releases nor is there any proof of any promise to pay the money or revive the debt. On the contrary testimony of Eliot Atwater on this subject given before the referee is as follows:

"Q. I read from the minutes at the adjourned first meeting of creditors taken before Harry Arnold, Esq., Referee, under date of June 22, 1918, at page 784:

'Q. Did your father Edward S. Atwater sign that release? A. He did.

Q. Stating to the Exchange and to the Secretary that there was no claim whatsoever upon that seat? A. That's right.

Q. And that the Seat was a gift to you? A. I am merely stating my recollection.

Q. Was the paper in writing that you produced? A. Yes, sir, what I saw in 1912 and am stating my best recollection.

Q. It was your understanding at the time and has been since that the papers executed by your father and the conditions under which the purchase of this Seat was made had to be an absolute gift in order for you to own that Seat? A. I understood it had to be released on his part of all claim.

Q. And that he had no claim against you personally for it, is that correct? A. I considered he had a moral claim against me for it.

Q. You owed a moral obligation to him? A. Yes, sir.'

Q. Do you recall so testifying? A. If you read it I will agree that I testified to it.

Q. I am reading from page 785 of the same testimony:

> 'Q. So far as the deal itself was concerned, from your talks with your father and from the papers you understood had to be signed, it was a gift to you? A. I have no talks with my father, but I understood from the paper that there was no claim against me legally by him.'

Q. Do you recall so testifying? A. If it is in there, I testified to it.

Q. Was the testimony I have read to you true, and the answers you made true? A. Yes, sir, as to my conception of it at that time.

Q. I am reading from page 795 of the same testimony:

"Q. Did you ever acknowledge any moral obligation? A. No, sir."

Q. Do you recall so testifying? A. I don't know what it applies to. If it is in there as my testimony, I said so."

It will be noticed that in the foregoing testimony Eliot Atwater states that he owed a moral obligation to his father, but, at folio 146, he testified as follows:

"Q. Did you ever acknowledge any moral obligation? A. No, sir."

We call attention to Eliot Atwater's understanding to the effect of the release, although the release speaks for itself. In his testimony, at folios 141 to 145 he states, "I understood from the paper that there was no claim against me legally by him."

Edward S. Atwater, the petitioner, further testified (fols. 111 and 112) that the subject of this advance of $75,000 for the purchase of the seat was never discussed between him and his son after he had advanced the money, *and that he does not remember that his son ever agreed to repay the money to him*, and, at folio 119, he testifies that his son never made any statement to him relative to the money or made any agreement with him for the repayment of the money and that he had no memorandum or promise.

The testimony which is quoted above was given by Eliot and Edward S. Atwater shortly after the filing of the petition in bankruptcy at the hearing at the first meeting of creditors.

It is thus entirely clear from the testimony of the bankrupt and his father that the original debt was released, and that there was no legal or moral obligation to repay the money.

It has been claimed by the counsel for the appellant in his brief that the payment of the interest to the father by the son, and afterwards by the firm to the son, shows an intent to revive the obligation, notwithstanding the absolute release thereof in writing and under seal.

We respectfully submit that, in view of the testimony, the payment of this interest does not in any way prove the existence of a debt from the son to the father, even between themselves, and certainly not as against creditors.

It must be noted that in the first partnership agreement it was provided between the partners that interest should be paid to Eliot Atwater at the rate of 6 per cent. upon the $75,000, the purchase price and initiation fee of his membership on the New York Stock Exchange, and that in the second agreement interest was paid to Morton Atwater on the amount of capital furnished by him, and also the same provision was contained in reference to the payment of interest to Eliot Atwater upon the value of his New York Stock Exchange seat, and interest was also agreed to be paid to Gilbert F. Foote upon the value of his Cotton Ex-

change seat. *What arrangement there was between Eliot Atwater and his father which induced him to hand over the interest received by him from the firm does not appear, and in the face of the positive evidence shown by the releases that no debt was existing and the absence of any proof reviving the debt as a legal or moral obligation, the mere payment of interest by the son to the father, or afterwards directly to the father by the firm during the absence of his son, created no legal or moral liability for the repayment of the principal*, and the fact that the interest was so paid has no probative force in this proceeding to establish any debt in favor of the appellant.

No legal liability having been established, the question arises, could there be any moral liability which would enable the petitioner, Edward S. Atwater, to enforce his claim against his son in bankruptcy? It must be remembered that even if there were any moral obligation, it could only be used in certain cases as a consideration for a new promise to pay the debt after the giving of the releases.

Assuming, for the sake of argument, that an inference might be drawn from any testimony, facts or circumstances presented in the record, of a promise to repay this money, there would be no consideration to support it, and it would not revive the debt, because it has been well settled by authority that where a person voluntarily releases a debt due him no moral obligation upon the part of the debtor survives which would furnish an adequate consideration for a subsequent promise to pay. It is only where the creditor is forced by in-

voluntary proceedings to release his debt that there remains the moral obligation which would furnish a consideration for a promise to repay it.

(See *Taylor v. Hotchkiss* and cases cited, 81 App. Div., p. 470, at pp. 475-476; affirmed in Court of Appeals, 179 N. Y. 546.)

It thus appears that any debt existing in favor of the father against the son was absolutely extinguished by the releases and was never revived.

Counsel for appellant ingeniously argues in his brief that the effect of these releases could only be invoked by creditors who were members of the Stock Exchange, and that other creditors cannot take advantage of it. *It is urged on behalf of the trustees that this release was effective not only in so far as it related to the members of the Stock Exchange, but was* also in favor of all persons who had dealings with the firm of Atwater, Foote & Sherrill and became creditors of such firm or of Eliot Atwater. While as between the parties Eliot and the petitioner, Edward S. Atwater, some such arrangement might have been made, this Court, under the circumstances and in view of the facts hereinafter shown that the firm advertised that they were members of the New York Stock Exchange, will not permit Edward S. Atwater to now re-assert his claim either as against the creditors of Eliot Atwater or creditors of the firm.

This Court will not lend its aid in the enforcement of such an alleged obligation, as the appellant now asserts, after his conclusive release of

any debt he had, by written releases, under seal and his acts tending to deceive the firm creditors as well as the Exchange.

The claimant does not come into this Court with clean hands. On the contrary, he wishes the aid of the Court in helping him to perpetrate a fraud. He admits that his son could not purchase a seat on the Exchange unless the obligation to repay the money loaned to him for the purchase of the seat was expressly released in writing, and also that his son had to make a statement that he was the sole owner of the seat on the Stock Exchange without any encumbrance. (Fol. 98; see also fol. 100).

Having released his claim and allowed his son to make the above statement, the obligation of his son to him was extinguished absolutely. While it may be true that the main purpose of the rules of the Exchange in requiring a person who loans money to another wishing to purchase a seat on the Exchange is to protect its own members, the release does not contain a limitation of this kind, and such limitation cannot be read into it now for the purpose of defeating the claims of other creditors.

A simlar question was passed upon by the Court, Southern District of New York in Matter *of J. M. Fisk & Co.*, decided by Seaman Miller, Esq., Referee, under date of July 12, 1912, whose findings were confirmed without opinion by a former Judge of the United States District Court, Hon. George C. Holt.

In that case, Eugene R. Washburn, the father, made a claim for $85,500 advanced to his son for

the purchase price of a seat on the Stock Exchange. Releases exactly like the ones in this case were given by the son to the father, and simultaneously with the execution of the release, the son gave the father his promissory note, promising to pay the sum of $85,500. The Referee said:

> *"In my opinion, the note in no way affected adversely the creditors of J. M. Fiske & Co., as the father had by the foregoing instrument in writing released the whole world from the payment of the sum involved in the original transaction whereby the Stock Exchange seat was purchased."*

That case was much stronger than the case at bar, for in the former there was an actual written promise to pay the released indebtedness. The Court expunged the claim both against the firm and against the individual partner.

The petitioner urges in his brief that his claim should be allowed under the authority in *Sterling v. Chapin*, 185 N. Y., 395. A careful reading of this case will enable this Court to note the distinction between it and the case at bar.

Sterling v. Chapin (*supra*) was an action for a co-partnership accounting between two brothers—the plaintiff's testator and the defendant. No question arose in that case as to the rights of creditors of the firm. The question decided was merely as to the rights between the partners, one of whom, the deceased partner, had advanced all the money for the purchase of the seat. While the deceased partner had given a release to the Exchange sim-

ilar to the one in the case at bar, there was not any evidence that was ever delivered to or even seen or heard of by the defendant. An account was opened in the books of the co-partnership several days after the execution of the release and was carried on such books at the time of its dissolution, and in that account the defendant each year exclusive of the one ending when the co-partnership was dissolved, was charged with interest upon the balance shown to be due from him, and was credited with various payments—the balance at the date of its dissolution due from him being $37,708.80. In addition to which the defendant more than two and one-half years after the execution of the release wrote to his brother a letter which acknowledged his indebtedness to him of the amount so charged against him. The Court of Appeals in making its decision said, at page 402:

> "Many days after the release was executed the defendant charged himself upon the co-partnership books with cash advanced for his seat. These entries mean that on that day the firm advanced said money, and first became his creditor upon the transaction in question."

The Court continuing said (p. 403):

> "What I emphasize is, that we have here an uncontradicted and unexplained admission of the defendant, by entries which are binding upon him, that upon a certain date the co-partnership advanced money to or for him, and that this co-partnership indebtedness was not affected by a prior individual release of one co-partner."

Attention is again called to the fact that no rights of creditors were in any way affected, and that the testator had supplied the entire co-partnership capital, out of which money was advanced for the purchase of the seat, and the Court said, at the foot of page 400:

> "If a co-partnership transaction, it would not have been strange or conclusive against plaintiff's claim, if in a release, not having that point in mind, he had definitely recited that the advance was made by himself; but this he did not do."

The Court further treated the moneys advanced for the purchase of the seat as a part of the capital of the firm and said (p. 401):

> "When we consider the facts that subsequently the parties by an account with items extending over seven or eight years expressly and continuously admitted that the co-partnership advanced money with which to purchase the seat, and that the defendant was indebted to such co-partnership for such advance, all uncertainty vanishes, and we have proof which is conclusive upon this appeal that the matter was a co-partnership and not an individual transaction."

Estoppel by reason of other acts.

An examination of the record discloses that from the inception of this firm down to the filing of the petition in bankruptcy it advertised extensively in

newspapers in the City of Poughkeepsie as "Members of the New York Stock Exchange," and all of their stationery, including their checks, bore this statement, and this fact was also prominently lettered on the windows of their offices.

That the firm was so advertising and holding out to the world that they were "Members of the New York Stock Exchange" was well known by Edward S. Atwater, the petitioner herein. (Fols. 127-129).

The words "Members of the New York Stock Exchange" certainly conveyed to the public the impression that the firm owned the seat and was a representation that it was a part of the firm assets.

Having acquiesced in the representations as to the ownership of a seat, and having absolutely released all claims against his son, the petitioner is estopped from asserting his claim as against creditors who relied on the fact that the firm was the owner of this seat, and the Court must at least hold that the petitioner's rights are subordinated to the claims of creditors who traded with this firm on the strength of the fact that it was, or one of its members was, the owner of the Stock Exchange seat.

The release was executed and delivered to Eliot Atwater for the purpose of showing to the Exchange that Eliot Atwater was freed from any indebtedness by reason of the loan, and thus made him solvent and able to perform financially his obligations. It cannot be now claimed that in fact the indebtedness was not discharged and that simultaneously with the execution of the release, or at

the time the loan was arranged, Eliot Atwater agreed to repay the same. If this were so the effect was to deceive the Exchange and the customers of the firm who dealt with it in reliance on the fact that the firm owned the seat.

The Court will not lend its aid in the enforcement of a contract the result of which was to deceive the customers of the firm.

POINT III.

WITH RESPECT TO THE CREDITS OF THE FIRM, THE RESPONDENTS' CONTENTION IS, THAT THE NEW YORK STOCK EXCHANGE SEAT WAS A CO-PARTNERSHIP ASSET.

An examination of the testimony shows that it was a contribution to the capital of the firm by Eliot Atwater. This was admitted by the appellant at folio 103 of the record, where, in answer to a question as to whether the seat was one source of the capital that the firm of Atwater, Foote & Sherrill were to have, he replied, "Yes, sir, that was it," and at folios 139 to 141, Eliot Atwater, after stating that there was no obligation to his father at the time the seat was bought, stated, at folio 141, that the seat was his contribution to the firm assets and his reason for getting in the firm.

Harold Sherrill, at folios 181 to 184, testified that Morton Atwater's contribution of the capital of the firm was to be $50,000, and Eliot Atwater's contribution was that he contributed the seat.

It is now argued on behalf of the petitioner that the co-partnership agreement indicates that the seat was not a contribution to the firm, but that its use was merely given to the firm. It will be noted that the same thing might be said of the $50,000 working capital which Morton Atwater contributed, because, taking the language of the agreement, it is stated that "Morton Atwater furnishes to the partnership the loan of $50,000 working capital" and that Eliot Atwater furnishes "the use of his membership on the Stock Exchange." Both these contributions, it will be noted by the agreement, were contributions to the *capital* of the firm, and the fact that in one case where the money was contributed it is stated to be a loan to the firm, and in the other case where the seat is contributed it is stated to be the use of the seat, does not alter the fact that both made up the capital of the firm, and Morton Atwater could not appear as a creditor until other creditors were fully paid, nor could Eliot Atwater claim his seat until creditors were fully paid.

The Court must determine the question as to whether the seat was a co-partnership asset, not only from the testimony of the parties themselves above referred to, but also in the light of all circumstances surrounding the purchase and use of the seat by a co-partnership of stock brokers.

Under the rules of the Stock Exchange the firm as such cannot have a seat in its name. It is always placed in the name of one of the partners, even although the firm may contribute the money for its purchase. It is for this reason that the seat

when purchased is placed in the name of a member of the firm. In fact, the appellant took part in the negotiations which led to the formation of this firm and testified (fols. 96 and 97) that there was talk about financing it, and as to whether they would need any capital, and the first talk that he had was, that he would furnish the means to buy a seat on the New York Stock Exchange, and that that was not enough, because Foote & Sherrill (the established firm into which the Atwaters were entering) felt as well as the Atwaters themselves, that they needed more money to do the business and the appellant said he was ready to contribute more. Whatever he contributed was put in by his son Morton Atwater as part of the capital of the firm.

It is perfectly clear that, inasmuch as under the rules of the Exchange the legal title to the seat had to be in the name of some individual member of the firm, and as it was a contribution to the *capital* of the firm by Eliot Atwater, it had to remain in his name. By reason of said rules it was necessary in preparing the co-partnership papers to so word the agreement as not to violate the rules.

All contributions to the capital of a firm are for the use of the firm. On dissolution such capital (if the firm is solvent) is returned to the respective contributors. When Eliot Atwater contributed the use of his seat on the Exchange, he contributed the seat itself as a part of his capital.

Attention is also called to the fact that objection was made to the parole evidence introduced by the

petitioner which tended to contradict the effect of the sealed releases. We think this objection was perfectly valid, inasmuch as the trustees was a privy of one of the parties to the release, to wit: Eliot Atwater. The rule is too well settled to require argument that parole evidence cannot be used to controvert or vary a written instrument in an action or proceeding as against the parties to the instrument or their privies.

POINT IV.

THE AUTHORITIES CITED BY THE PETITIONER DO NOT SUSTAIN HIS CONTENTION AS TO THE EFFECT OF THE RELEASE.

The petitioner seeks to evade the effect of the estoppel created by the acts of his son and himself by now claiming that he can assert his claim against his son after rights of creditors have intervened, and the decisions cited by him on Page 24 of his brief attached to the moving papers on this application are only authority that in certain cases the conditions connected with the execution of a paper may be shown. But they cannot be considered to mean that the legal effect of an instrument may be altered by parole evidence long after the real transaction, when its effect will be to deprive creditors of their security.

Circuit Judge Manton in writing the prevailing opinion herein says:

> "The release here does not contain any limitation which would indicate an intent at the

time of its execution, of a conditional delivery so as to satisfy the requirements to purchase a membership upon the Exchange. We cannot read into the language of the release such limitation and thus defeat the claims of other creditors. The appellant was an attorney at law, although not actually engaged in practice. He had full opportunity to read and understand the force and effect of the document he executed. He released the whole world from payment of the sum involved. He represented not only to the Stock Exchange members, but to everyone that so far as he was concerned, his son owed him nothing for the Stock Exchange membership. Nor can we support the claim of the appellant, because he received interest on the loan of Seventy-five Thousand Dollars from his son against this sealed and solemn instrument of release. We think he is estopped from asserting his claim."

The only case cited by the petitioner which is at all applicable to the facts of this case is Sterling vs. Chapin (185 N. Y. 395) which we have already distinguished. Judge Manton says of that case that the action there was for an accounting between the parties.

The brief of the petitioner is based upon the assumption that the parties intended the release to be operative only so far as the Stock Exchange seat was concerned. We challenge this assumption and say it was only after the bankruptcy that the petitioner conceived that idea. Eliot Atwater says at folios 141-147 of Record:

"I understood from the papers there was no claim against me legally by him."

Edward S. Atwater, the petitioner, says at folio 119 of Record, his son never made any statement to him relative to the money or made any agreement with him for the repayment of the same and that he had no memorandum or promise.

In view of the testimony just quoted how can it now be claimed that the intention of the parties was to preserve the debt, and that therefore it can be claimed a limited effect of the release should re-create the debt as against creditors, which was created without any reservations whatsoever in the releases or between the parties?

POINT V.

THE PETITION SHOULD BE DISMISSED AND THE WRIT OF CERTIORARI PRAYED FOR SHOULD NOT BE GRANTED.

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